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IN THE
SUPREME COURT OF THE UNITED STATES

JAIME CASTILLO, BRAD EUGENE BRANCH,
RENOS LENNY AVRAAM, GRAEME LEONARD CRADDOCK,
KEVIN A. WHITECLIFF,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION, AND THE ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Under 18 U.S.C. § 924(c), which describes the offense of using or carrying a "firearm" during and in relation to certain federal crimes, does the 1993 language which sets the mandatory consecutive sentence at thirty years rather than five "if the firearm is a machinegun" make the nature of the firearm an element of the offense, to be charged in the indictment and found by the jury beyond a reasonable doubt, or is it only a "sentencing factor" to be determined by the judge by a preponderance of the evidence?

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INTERESTS OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, nonprofit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 10,000 attorneys. NACDL is affiliated with state and local criminal defense organizations with which it works cooperatively on issues related to criminal law and procedure, and thus, it speaks for more than 28,000 criminal defense lawyers nationwide. Among NACDL's objectives is to ensure the proper administration of criminal justice and to promote fair and consistent application of sentencing laws.

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan organization that conducts research, promotes advocacy, and educates the public regarding the excessive cost of mandatory minimum sentencing. FAMM argues that such laws, of which 18 U.S.C. § 924(c) is a prominent example, are expensive and inefficient, perpetuate unwarranted sentencing disparities, inflict disproportionate sentences, and transfer the sentencing function from the judiciary to the prosecution. Founded in 1991, FAMM has 30 chapters and 18,000 members nationwide. FAMM conducts sentencing workshops for its members, publishes a newsletter, serves as a sentencing clearinghouse for the media, and researches sentencing cases for pro bono litigation. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime.

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[1]In accordance with Supreme Court Rule 37.6, amici curiae represent that no party other than counsel for amici authored this brief in whole or in part, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief. The petitioners and respondent have consented to the filing of this brief, and amici have filed the letters of consent with the Clerk of the Court, pursuant to Supreme Court Rule 37.3.

The Association of Federal Defenders (AFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment of the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the AFD's missions is to file amicus curiae briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

I. SUMMARY OF ARGUMENT

The case presented today requires this Court to determine whether the firearm types mentioned in section 924(c) of Title 18 of the United States Code are elements of the substantive offense or something much less - sentencing factors.

How these words are treated has fundamental effects on criminal defendants. Offense elements must under the constitution be charged in the indictment, submitted to a jury for their deliberations. Guilt does not exist unless or until the jury is convinced beyond a reasonable doubt. Section 924(c) itself gives no explicit answer. Nonetheless *United States v. Jones*, 526 U.S. 227 (1999), provides the methodology for answering this question. To avoid violation of the clear and longstanding constitutional requirements for full and fair notice of the charges and trial by jury with proof beyond a reasonable doubt, *Jones* requires that the facts set out in section 924(c) be treated as elements of the offense and not as mere sentencing factors. To do otherwise would diminish to the confidence both of the jurors who serve in federal criminal trials and of the public for whose

protection this system is designed.

II. ARGUMENT

In recent years this Court repeatedly has had to decide what conduct Congress has criminalized under section 924(c) of Title 18 of the United States Code. *See Muscarello v. United States*, 524 U.S. 125 (1998); *Bailey v. United States*, 516 U.S. 137 (1995); *Smith v. United States*, 508 U.S. 223 (1993). A scant eleven months ago this Court grappled with the question of what factfinding role Congress gave to the jury in determining criminal guilt versus the role of the judge in making factfinding assessments relative to sentencing. *See Jones*, 526 U.S. 227. These two issues come together in the case now before this Court.

As *Jones* recognized, "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." 526 U.S. at 319 (citations omitted). Like the car jacking statute at issue in *Jones* and unlike the homicide statute at issue in *McMillan v. Pennsylvania*, 477 U.S. 79, 85-86 (1986), the firearm statute at issue here, 18 U.S.C. § 924(c), does not come with a self-executing declaration that pronounces the distinction Congress intended to make between elements and sentencing factors. *Jones* provides clear guidance on the proper method for construing section 924(c) and the correct interpretation.

A. CONGRESS HAS SHOWN NO INTENT IN THE LANGUAGE OF SECTION 924(C) TO DIMINISH THE JURY'S ROLE AS FACTFINDER

As noted by this Court last year in *Jones*, the relative roles of jury and judge have competed in our history. 526 U.S. at 227. The Framers of the Constitution recognized that tension and crafted a document that preserved the role of the jury in both civil and criminal trials. *See* U.S. Const. art III, sec. 2, para. 3, amends. VI & VII.

As detailed further below, the jury's role in both returning a federal indictment and in determining guilt and innocence is a cornerstone of our criminal justice system. Yet the Fifth Circuit in its *Castillo* decision sanctioned the district court usurpation of the jury's factfinding role without any clear indication from Congress that it intended such a shift that fundamental role from the jury to the trial judge.

As explained in *Jones*, this Court's understanding of a statute is aided by consideration of its words, structure, and in some cases, its legislative history. As Petitioners have already discussed in some detail, there is no real difference in the wording and structures of sections 924(c) and 2119 (the Anti-Car jacking statute that was the subject of this Court's *Jones* decision). *See*, Petition for Certiorari, pages 9-11. And as summarized below, there is nothing in the legislative history of section 924(c) that demonstrates Congress intended any different result.

1. A Brief Legislative History of the 1993 Version of Section 924(c) of Title 18 of the United States Code

The legislative history from § 924(c)'s initial passage in 1968 is not particularly helpful as it is almost nonexistent. *See Simpson v. United States,* 435 U.S. 6, 15 (1978) (describing legislative history of the statute as "sparse"). More insight can be gained from the history of the 1984 revisions, which came as a part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §1005(a), 98 Stat. 2138-2139. Through these 1984 changes Congress substituted the phrase "crime of violence" for the term "felony" in order to include violent misdemeanors and to exclude non-violent felonies. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 313 n.9 (1983). Congress combined the "uses" and "carries" prongs of the statute, deleted the requirements that the firearm be used "to commit" the offense or the weapon be carried "unlawfully," and imposed instead the "during and in relation to" requirement with respect to both "use" and "carry" liability.[2] The legislative history accompanying

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[2]The 1984 amendment to § 924(c) read in pertinent part as follows:

> Whoever, during and in relation to any crime of violence . . . (including a crime of violence . . . which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . . be sentenced to imprisonment for five years . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run

the 1984 amendment indicates that section 924(c)(1) was revised "to ensure that all persons who commit Federal crimes of violence" were covered. S. Rep. No. 225, at 312-13, 1984 U.S.C.C.A.N. at 3184, 3490-91.

In making these revisions Congress demonstrated that it pays close attention to federal court decisions applying section 924(c). Two such decisions were this Court's opinions in *Simpson v. United States,* 435 U.S. 6, and *Busic v. United States,* 446 U.S. 398 (1980). In *Simpson,* this Court held that the legislative history of section 924(c) demonstrated that Congress did not intend to "[authorize] the imposition of the additional penalty of § 924 (c) for commission of bank robbery with firearms already subject to enhanced punishment under § 2113(d)." 435 U.S. at 13. In *Busic,* this Court held "that prosecution and enhanced sentencing under § 924(c) is simply not permissible where the predicate felony statute contains its own enhancement provision." 446 U.S. at 404. *Busic* also commented that "[i]f corrective action is needed, it is the Congress that must provide it." *Id.* at 405. Congress listened and amended the statute:

> [*Simpson* and *Busic* have] negated the section's use in cases involving statutes, such as the bank robbery statute . . . which [has its] own enhanced, but not mandatory, punishment provisions in situations where the offense is committed with a dangerous

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concurrently with any other term of imprisonment including that imposed for the crime of violence . . . in which the firearm was used or carried.

Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138, 2139.

> weapon. These are precisely the type of extremely dangerous offenses for which a mandatory punishment for the use of firearm is the most appropriate.

Continuing Appropriations, 1985-Comprehensive Crime Control Act of 1984, S. Rep. No. 98-225, 98th Cong. 2d Sess. 312 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3490.

As then-Circuit Judge Kennedy explained in *United States v. Stewart,* 779 F.2d 538 (9th Cir. 1985), the courts the new language Congress added to section 924(c) as clarifying:

> Our study of the legislative history of the amendment, S. Rep. No. 225, 98th Cong., 1st Sess. 312-14 (1983), reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3490-92 [hereinafter "Senate Report"], indicates *the "in relation to" language was not intended to create an element of the crime that did not previously exist,* but rather was intended to make clear a condition already implicit in the statute.

Stewart, 779 F.2d at 539-540 (emphasis added). Justice Kennedy's recognition for the Ninth Circuit that 924(c) involved a listing of offense elements was not hindered by its recognition that the "the evident purpose of the statute was to impose more severe sanctions where firearms facilitated, or had the potential of facilitating, the commission of a felony." *Id.* at 540.

In 1986 Congress added penalty enhancements

that depended on the firearm type. *See* Firearms Owners' Protection Act, P.L. 99-308, 100 Stat. 449. While these were changes Congress plainly made to increase the sentences defendants receive for violating section 924(c), nothing in these changes indicated any intention on Congress's part to create "sentencing factors" rather than elements of a more detailed criminal offense. Congress gave no indication that the revision of the statute included a change in the understanding that these facts were for the jury to determine after proper notice through an indictment. The House Judiciary Report on a defeated proposal during this congressional session, H.R. 4227, observed that section 924(c) "is in reality a separate offense" even though it "is frequently referred to as a penalty provision ...." H. Rpt. 99-495, 99th Cong., 2d Sess., 10 (1986).

1988 brought more revision in the form of Public Law 100-690. This time section 7060(a) of the Anti-Drug Abuse Act of 1988 made some relatively minor grammatical changes to 924(c)(1). However, section 6460 of Pub. L. 100-690 greatly increased the penalties applicable to violating section 924(c) when the firearm type was a machine gun or silencer – from 10 years to 30 years and, in the case of a "second or subsequent conviction" from twenty years to life imprisonment.

The 101st Congress also amended section 924(c) by adding, in 1990, enhanced sentences for short-barreled rifle or short-barreled shotgun (10 years) or a "destructive device" (same as those applicable to machine guns). *See* Crime Control Act of 1990, Pub. L. 101-647. This Congress also rejected a Senate proposal, Senate Bill 1972, that the Department of Justice opposed because, in the Department's view, SB 1972 would "make

section 924(c) into a penalty enhancement provision." 136 Cong. Rec. S9080 (June 28, 1990).

Thus by the time search warrants were being executed on the Branch Davidian complex in 1993, Congress had amended section 924(c) numerous times and in numerous ways. In so doing, Congress increased the maximum possible sentence and created mandatory sentences that could be imposed on these defendants. Throughout these amendments, however, Congress evidenced no intention to divest criminal juries of their factfinding power. Rather Congress acted to adjust language it had used in the earlier formulation of section 924(c) in response to federal court rulings that Congress considered too limiting. *See., e.g., Simpson,* 435 U.S. 6. While making these changes, Congress also rejected proposals to treat 924(c) as a mere enhancement provision. Thus there is nothing in the statutory language or in the legislative history of 924(c) before 1993 that supports the Fifth Circuit's conclusion that the firearm type is a sentencing factor that does not have to be alleged in the indictment and proved to a jury beyond a reasonable doubt.

2. Congress Has Demonstrated That it Recognizes Firearm Types as Offense Elements in Section 924(c)

An examination of other congressional efforts involving section 924(c) further supports the conclusion that firearm type is an offense element.

Certainly since this Court's 1986 decision in *McMillan v. Pennsylvania,* 477 U.S. 79, Congress has been well aware that it had some level of constitutional

power to distinguish between "offense elements" and "sentencing factors" in its creation of criminal statutes. Yet Congress has not denigrated the role of the federal jury by converting offenses element s to sentencing factors.

Congress has shown much interest, however, in limiting the discretion of federal judges. The creation of the federal sentencing guideline scheme is the prime example.[3] The federal "three-strikes" law, section 3559(c) of Title 18 of the United States Code, is another such example.

Section 3559(c) mandates life imprisonment for certain repeat offenders[3] who commit "a serious violent

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[3] The creation of the United States Sentencing Guidelines is an example of explicit congressional delineation of the judge's factfinding role in sentencing. Recognizing that the type of firearm is an element in section 924(c) prosecution does nothing to endanger the validity of Congress's creation of guideline-based sentencing. Rather it simply demonstrates that the courts should not readjust the traditional role of the jury in factfinding unless that is Congress' explicit intent. *Cf. United States v. Watts*, 519 U.S. 148, __, 117 S.Ct. 633, 638 (1997)(per curiam)(Breyer, J., concurring)("Given the role that juries and acquittals play in our system, the Commission could decide to revisit this matter in the future. ...[A]s far as today's decision is concerned, the power to accept or reject such a proposal remains in the Commission's hands.")

[3] Before a life sentence can be imposed under section 3559(c) the following conditions must be satisfied:

> "(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of--
>
> (i) 2 or more serious violent felonies; or
>
> (ii) one or more serious violent felonies and one or more serious drug offenses; and
>
> (B) each serious violent felony or serious drug offense

felony." The definition of "firearms use" contained in subsection 3559(c)(2) demonstrated Congress' clear recognition that § 924(c) involves offense elements. It states:

> the term "firearms use" means *an offense that has as its elements those described in section 924(c)* or 929(a), if the firearm was brandished, discharged, or otherwise used as a weapon and the crime of violence or drug trafficking crime during and relation to which the firearm was used was subject to prosecution in a court of the United States or a court of a State, or both

18 U.S.C. § 3559(c)(2)(D)(emphasis added). There is no limitation on the § 924(c) offense elements this definition recognizes.

Amendments to § 924(c) after 1993 also show that Congress has made no effort to construct § 924(c) into a mere sentencing factors statute. Congress has almost continuously amended § 924(c) and has done so frequently in response to federal court decisions.[4] The amendments that Congress has made to § 924(c) are

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> used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense."

[4] Following *Bailey v. United States*, 516 U.S. 137 (1995), for example, Congress added as an alternative to the "uses or carries a firearm" language "in furtherance of any such crime, possesses a firearm." *See* 18 U.S.C. § 924(c)(1)(A)(1998). See also *Simpson* and *Busic* and the 1984 amendments discussed *supra*.

further evidence that the firearm types are offense elements.

The 1994 amendments to section 924(c) were fairly simple.[5] The only change relevant to firearm type was the addition of "semiautomatic assault weapon" after "short-barreled shotgun" in the first sentence of subsection (c)(1). Pub. L. 103-322, § 110102(c)(2), as amended Pub.L. 104-294 § 603(p)(1). This addition was described simply as adding another firearm type to "the *crimes* covered by the mandatory minimum." H. Rep. 103-489, at 23 (1994), reprinted in 1994 U.S.C.C.A.N. 1820, 1823 (emphasis added). Such a characterization of this addition is inconsistent with a congressional intent to treat firearm type as mere sentencing factors. *Compare Jones*, 526 U.S. at 323.

The 1998 changes to section 924(c) were much more substantial. Pub. L. 105-386 enacted on November 1998 was entitled an "An Act to throttle criminal use of guns." This Act replaced 924(c) with an even more parsed and subdivided new version.[6] Nonetheless, the

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[5] Amendments to section 924 as a whole were far more extensive that session. For example, the 1994 amendments also saw the adoption of a death penalty in then subsection 924(i).

[6] That new version of Section 924(c) now reads:

> "(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> "(i) be sentenced to a term of imprisonment of not less than 5 years;
>
> "(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> "(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> "(B) If the firearm possessed by a person convicted of a violation of this subsection--
>
> "(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
>
> "(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.
>
> "(C) In the case of a second or subsequent conviction under this subsection, the person shall--
>
> "(i) be sentenced to a term of imprisonment of not less than 25 years; and
>
> "(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.
>
> "(D) Notwithstanding any other provision of law--
>
> "(i) a court shall not place on probation any person convicted of a violation of this subsection; and
>
> "(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug

structural and grammatical analysis used by the Fifth Circuit in its *Castillo* decision does not support a construction of the 1998 version of 924(c) as creating sentencing factors. *See Castillo*, 179 F.3d at 326-28.

First, subsection 924(c)(1)(A) is incomplete and fails to define a crime without use of one of the three subsections (i), (ii), or (iii). These subparagraphs set sentencing consequences that depend additional historical facts about the defendant's actions with a firearm – if he additionally brandished or discharged it the sentence is increased. On the other hand, the subsections involving the firearm type - - 924(c)(1)(B) and 924(c)(1)(C) - - are structurally different in the 1998 version by being more independent than the earlier versions. This newly found grammatical freedom might lend some support for reading into these sections a congressional listing of sentencing factors it intended to be left to the sentencing judge. *See Jones*, 526 U.S. at 319. However this change, even if it does evidence such a shift to sentencing factors, only effects factfinding involving the brandishing and discharge of the firearm and not the type of firearm so used.

Second, nothing in the debate over these changes indicates that Congress intended either to shift what were elements of offenses into sentencing factors or to clarify what Congress had always thought were sentencing factors. Rather, as Senator McCollum explained, these paragraphs were added in response to this Court's *Bailey* decision:

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trafficking crime during which the firearm was used, carried, or possessed."

> The bill passed out of committee strikes the now unworkable "use and carry" element of the statute and replaces it with a structure that allows a penalty enhancement for "possessing, brandishing or discharging" a firearm during and in relation to a Federal crime of violence or drug trafficking crime. Possessing will result in a 10-year mandatory sentence, brandishing will bring 15 years, and discharging will lead to a mandatory 20 years in Federal prison. The legislation retains current law which allows for higher penalties for machine guns, destructive devices, firearm mufflers and firearm silencers.

144 Cong. Rec. H. 531. Nothing in the House debates regarding these changes indicated that it was anyone's intent to change the relative roles of judge and jury in the finding of fact in criminal trials.

3. The Rule of Lenity Requires Reading Firearm Type in Section 924(c) as an Offense Element So That Defendants Have Full Notice Through the Indictment of the Charges and Full Consideration of Their Guilt or Innocence Determined by the Jury

The Rule of Lenity, which requires that "penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION 29 (1997) ("The rule of lenity is almost as old as the common law itself."). As

Chief Justice Marshall explained, the Rule "is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislature, not in the judicial department." *Wiltberger*, 18 U.S. at 95. Thus, the Rule of Lenity "insists that only the legislature define crime, and that the definition be clear and precise before courts may impose punishment." Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 201 (1994).

The Rule also emphasizes that the accused should receive fair warning that her conduct falls within the statutory prohibition. *See id.* As Justice Holmes taught, "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). *See also* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 413-14 (1991) (The Rule of Lenity "serves the representation-reinforcing goal of protecting a relatively powerless group [people accused of committing crimes] and the normativist goal of injecting due process values of notice, fairness, and proportionality into the political process.").

Lenity is not the first tool of statutory interpretation that courts use or should use. Only after the courts have examined the statute's language and considered evidence of congressional intentions (e.g., legislative history) does lenity come into play. This order of its, however, does not lessen its importance. Lenity remain a means of construction that is particularly important in criminal cases. For example, this Court in

Simpson v. United States, 435 U.S. 6, 12 (1978), used it in part to avoid a constitutional double jeopardy problem. The *Simpson* Court appealed to legislative history, read the statute narrowly, and, in accord with the rule of lenity, construed the statute in a narrow manner that lessened the defendants' exposure to criminal sanctions. *See id.* at 13-15 (declining to interpret a federal criminal statute in a manner that would increase penalties on defendants "when such an interpretation can be based on no more than a guess as to what Congress intended").

Importantly, the Rule of Lenity is not a device for creating ambiguity. Rather, it provides a check on judicial activism. Just as it is often tempting for courts to expand the reach of a criminal statute, ever so slightly, in order to cover the conduct of a defendant whose conduct falls just outside the express language of a criminal statute, it is also tempting to increase the punishment imposed on a particular defendant that the judge views to be especially undeserving. The facts of *Jones* itself involved such a situation. And as Chief Justice Marshall explained, the Rule of Lenity seeks to guard against this very natural impulse:

> It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

Wiltberger, 18 U.S. at 96.

The Court's more recent pronouncements make it

clear that the Rule of Lenity continues to hold an important place in the Court's interpretive practice. This Court explained in *United States v. Bass*, 404 U.S. 336 (1971), that "'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is *clear and definite*.' *Id.* at 347 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952))(emphasis added). *See also Adam Wrecking Co., v. United States*, 435 U.S. 275, 284-85 (1978). In like vein, when the choice has to made between two readings of who holds the factfinding role in a criminal trial, Congress should speak in clear and definite language before such a traditional function is shifted from the jury to the judge.

Even at best, the government's reading of § 924(c) can hardly be said to be "clear and definite." Nor can, even at best, the government's construction that the firearm type is part of a mere set of "sentencing factors" be fairly said to be "decisively clear" or "plain and unmistaken." *See Universal C.I.T. Credit Corp.*, 344 U.S. at 224; *Bass*, 404 U.S. at 348 (this Court applied the Rule of Lenity because Congress had not "'plainly and unmistakably'" spoken) (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917)).

To be sure, this Court has stated that the Rule of Lenity does not hold Congress to an impossible level of specificity. *See* SCALIA, *supra*, at 28 ("Every statute that comes into litigation is to some degree 'ambiguous.'"). In *Smith*, for example, this Court stated that the Rule should come into play most usually after other tools of statutory construction have been exhausted. 508 U.S. at 239-40.

Thus in *Smith*, the Court decided that "use [of] a firearm" included the use of it for barter, declining to use the Rule of Lenity as the basis for a more narrow reading. The Court reached its conclusion because the government's proposed construction fell "squarely within the common usage and dictionary definitions" of the statutory phrase and because "Congress affirmatively demonstrated that it meant to include transactions" like the defendant's in that case. 508 U.S. at 240.

Because Congress has not spoken with this level of clarity here, this Court should reject the Fifth Circuit's decision that allows federal judges to usurp the role of the jury in factfinding.

B. REDUCING THE ROLE OF JURY FROM THE FACTFINDING PROCESS DIMINISHES THE ACCURACY OF THAT FACTFINDING AND HARMS THE PUBLIC'S CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM

1. Given the Framers' Intent and the Historical Role of the Jury Show this Court Should Not Interpret this Statute so as to Reduce the Jury's Function in Criminal Trials.

As Professor Lawrence Friedman observed, "A system of criminal justice is more than rules on paper. It is also a plan for the distribution of power among judges, jurors, legislators, and others." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW, 251 (1973). At the time the Constitution's creation, the jury was viewed as an essential tool against excessive governmental power over the individual. The jury provided a check by giving not

only a voice but a power to interject "the moral sense of the community," when warranted, against a defendant's conviction. *Id.*

Obviously the roles of judge and jury have changed since 1787. "The rules of evidence evolved and a whole range of procedural changes were developed, including the special verdict, special interrogatories, and directed verdicts. These changes largely reflect efforts to make the law more scientific. The resulting erosion of the role of the jury stands in stark opposition to the intent [of] the Framers." J. Wilson Parker, FREE EXPRESSION AND THE FUNCTION OF THE JURY, 65 B.U.L. Rev. 483, 500 (1985).

In this system the judge and the jury compete for power. *See Jones*, 526 U.S. at 327. But it remains the jury who returns the verdict. It is the jury's function to prevent government oppression by acting as a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). It is the jury who brings into the courtroom the community and its judgment as to the strength of the government's evidence. Through their verdicts, juries hold "the ultimate power to make decisions about crime and criminal law." Friedman, *supra* at 252.

In effect, the *Castillo* decision endangered the respect the criminal justice system paid to the jury's verdict. It did so by ignoring the very factual findings the jury necessarily reached in its deliberations over the factual questions that the government readily admits were offense elements - whether the individual defendants used or carried a firearm in and during

relation to a crime of violence. To approve the Fifth Circuit's decision would greatly harm the function the jury is designed to perform. Such a fundamental destruction of the jury's community check on the power of government should be rejected.

As de Tocqueville in his epic DEMOCRACY IN AMERICA observed, the jury plays a fundamental and important role in our republican form of government:

> To regard the jury simply as a judicial institution would be taking a very narrow view of the matter, for great though its influence on the outcome of lawsuits is, its influence on the fate of society itself is much greater still. The jury is therefore above all a political institution, and it is from that point of view that it must always be judged.
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> The jury may be an aristocratic or a democratic institution, according to the class from which the jurors are selected; but there is always a republican character in it, inasmuch as it puts the real control of affairs into the hands of the ruled, or some of them, rather than into those of the rulers.

A. De Tocqueville, DEMOCRACY IN AMERICA, 272 (G. Lawrence trans., J. P. Mayer, ed. 1969).

2. Taking from the Jury its Traditional Factfinding Role Would Needlessly Diminish the Jury's role in the Criminal Justice System without Gaining any Greater Accuracy in Factfinding.

An implicit assumption of the government's opposition to reading firearm types as elements of a 924(c) prosecution is the fear that juries often get the facts wrong. There is no real evidence that this assumption is true and ample evidence that it is not. As observed in a civil context in *In re United States Fin. Sec. Litig.*, 609 F.2d 411, 429-30 (9th Cir. 1979), "no one has yet demonstrated how one judge can be [a] superior fact-finder to the knowledge and experience that citizen-jurors bring to bear on a case. We do not accept the underlying premise of appellees' argument, that a single judge is brighter than the jurors collectively functioning together. " *Id.* at 431 (internal quotes omitted).

Juries plainly bring a group dynamic to their factfinding that is absent when a single judge performs such a task. Such group dynamics might add a sense of unpredictability from a lawyer's perspective. But studies from both the civil and criminal trial context have shown the jury to be "remarkably adept as triers of fact. Virtually every study of them, regardless of the research method, has reached that conclusion.... The capabilities of jurors -- perhaps not as individuals but as a group -- even appear to extend to cases of the greatest complexity." SYMPOSIUM ISSUE ON THE SELECTION AND FUNCTION OF THE MODERN JURY: ARTICLE: CITIZEN COMPREHENSION OF DIFFICULT ISSUES: LESSONS FROM CIVIL JURY TRIALS, 40 Am. U.L. Rev. 727, 745 (1991)(citing J. GUINTHER, THE JURY IN AMERICA, 230-31 (1988)).

The University of Chicago Law School examined judge and jury performance in both civil and criminal trials. This study confirmed the skill of juries discovering "a high rate of judge-jury agreement: judges agreed with juries in seventy-eight percent of the cases. In those criminal cases where disagreement occurred, the jury favored acquittal to a greater extent than the judge.[7] In civil cases, however, the disagreements were evenly balanced between verdicts for the plaintiff and those for the defendant." *Id.* at 745-46 (internal footnotes omitted). Researchers found that the different verdicts reached by jury and or judge in criminal cases were not due to the complexity of the evidence presented in the case. "Instead, disagreements between the judge and jury tended to occur most frequently in those cases in which community values played a role." *Id.* at 746. As discussed above, those are precisely the type of disagreements the jury is designed to preserve.

3. Public Confidence is Diminished by Allowing Sentencing Decisions to be Based on the Judge's Reassessment of Facts that the Jury Has Already Necessarily Considered and Weighed in Reaching its Verdict

As already detailed, the jury functions to

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[7] A jury introduces "a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions ...." *United States v. Thomas*, 166 F.3d 606, 616 (2d Cir. 1997). The vying powers of jury and judge are "part and parcel of the system of checks and balances embedded in the very structure of the American criminal trial ...." Gerard N. Magliocca, THE PHILOSOPHER'S STONE: DUALIST DEMOCRACY AND THE JURY, 69 U. Colo. L. Rev. 175, 176-77 (Winter 1998).

determine the facts of the charges against the defendant. It is undisputable that the jury in a 924(c) prosecution must in its deliberations focus on the firearm element. Inherent in the jury's effort to determine whether the defendant "used or carried" that object ("a firearm") at a certain time and for certain reasons ("during and in relation to the commission of a crime of violence"), is the need on the jury's part to identify that specific thing that the government asserts is a "firearm." A jury focusing its collective attention on deciding whether a defendant used or carried a firearm must perforce also focus on a specific firearm or a specific number of firearms.

Assuming that the jury finds that a defendant did indeed use or carry an object during and in relation to the defendant's commission of a crime of violence, the jury remains obligated to decide whether that object is indeed a firearm. Herein lies the fundamental problem classifying the type of firearm as a mere sentencing factor. Section 921(a) defines both the generic "firearm" and the various firearm types that the government asserts are part of a separate sentencing factor which the jury need not trouble itself with determining. There is only mischief in store for separating the jury's work to identify the object and declare its nature as "a firearm" from the sentencing judge's work at specifying the kind of firearm. The inefficiency is clear. But the real danger is that the trial judge will focus on an object that the jury has already considered and rejected. For example, the district court in this case found that two of the petitioners, Castillo and Craddock, carried a hand grenade on April 19, 1993. (Pet. App. 168a). But the indictment charged petitioners with the 924(c) violation for using or carrying firearms *only* on February 28, 1993. Plainly, the sentencing judge focused his attention on

objects that the jury did not concern itself with in reaching its guilty verdict on the 924(c) count.[8]

Thus the separation of the firearm type finding from the finding of guilt creates no advantage. But it does create vast dangers of inconsistencies between what the jury had determined (but perhaps was not asked to specify in its general verdict) and the judge's findings at sentencing. Certainly if the individual jurors reached a certain finding and learned that the trial judge overrode that finding at sentencing, the individual jurors would understandably lack confidence in the rightfulness and justice of the sentencing decision. In no less manner, the public's confidence is diminished by allowing sentencing decisions to be based on the judge's reassessment of facts that the jurors have already necessarily considered and weighed in reaching their verdict.

C. EVEN IF FIREARM TYPE IS A SENTENCING FACTOR UNDER SECTION 924(c), THE JUDGMENT OF THE COURT BELOW MUST BE VACATED AND THE CASE REMANDED FOR FURTHER PROCEEDINGS, BECAUSE OF THE LOWER COURTS' MISAPPLICATION OF THE PINKERTON DOCTRINE

The 924(c) count on which each of the petitioners was convicted was predicated on his having used or carried "a firearm" on February 28, 1993, during and in furtherance of the offense of conspiring to murder agents.

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[8] And as discussed *infra*, this shifted view of the facts that make up the charged offense raises serious problems vis-a-vis the grand jury's role in passing on the indictment.

Yet all the defendants were acquitted on the conspiracy to murder count. Whether these verdicts are inconsistent is not terribly important or troubling.[9] What is troubling is the way the trial court expanded its own instructions on *Pinkerton* liability and in doing so expanded the indictment's charges well beyond the accusations the grand jury has handed down. *See* Respondent's Brief in Opposition to Petition for Certiorari, 8.

Liability under *Pinkerton* is dependent on a *conviction* for the charged conspiracy. *See Pinkerton v. United States*, 328 U.S. 640 (1946). *Pinkerton* permits a convicted co-conspirator to be held criminally liable for any crime committed by another party to the agreement where he could have reasonably foreseen the criminal conduct, such as where the crime committed by the other party was the object of the conspiracy or the natural consequence of the unlawful agreement.[10] Consistent with this limited form of criminal liability, the district court gave a Pinkerton instruction: *"if you have first found a Defendant guilty of the conspiracy charged in Count One,* and if you find beyond a reasonable doubt that during the time the Defendant was a member of that conspiracy, other conspirators committed the offenses in [Count Three] . . . in furtherance of or as a foreseeable

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[9] Inconsistent verdicts are permissible provided that the counts of conviction are supported by sufficient evidence. *See e.g. United States v. Powell*, 469 U.S. 57, 64-69 (1984).

[10] Aider and abettor liability under 18 U.S.C. § 2 is not the same. Aiding and abetting is a different form of accomplice liability that holds a defendant accountable for the actions of a primary party where it is proven that the defendant intentionally assisted the primary party in the unlawful conduct. *See e.g., Nye & Nissan Corp. v. United States*, 336 U.S. 613, 619 (1949). No conspiracy need exist.

consequence of that conspiracy, then you may find the Defendant guilty of [Count Three] . . . ." Thus, the instruction required that the jury have "first found a Defendant guilty of the conspiracy charged in Count One," which the jury did not. Instead, the jury acquitted each defendant of the Count 1 conspiracy.

The premise to this instruction was not met as evidenced by the verdict of not guilty on Count 1. Therefore, the jury did not find any defendant guilty of any substantive offense, such as the § 924(c) count, under a *Pinkerton* theory. Yet the trial judge relied on that rejected theory of liability for sentencing purposes.

On appeal from the resentencing, the *Castillo* court permitted the sentencing judge to use *Pinkerton* liability when none was found by the jury. As such, the Fifth Circuit's decision in this case effectively allowed an amendment to the charges after the jury verdict. This decision should not be allowed to stand. To do so would undermine the work of both the grand and petit juries. This Court in *Russell v. United States*, 369 U.S. 749 (1962), condemned[11] any judicial action of this sort as such a change destroys the role of the grand jury and in so doing "plac[es] the rights of the citizen . . . at the mercy or control of the court." *Id.* at 770-71.

Thus even if this Court concludes that a firearm type is not an element of the offense charged in a § 924(c) prosecution, the district court's blatant misuse of *Pinkerton* cannot be upheld by this Court.

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[11] This Court soundly rejected the notion that "it lies within the province of a court to change the charging part of an indictment to suit its own notions" of justice. *Russell*, 369 U.S. at 770-71.

CONCLUSION

For the foregoing reasons, the judgment of the Courts of Appeals should be reversed.

Respectfully submitted,

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